Eel Weir Hydropower Project WQC

• Correspondence pertaining to U.S. EPA Region I letter re: river herring passage on the St. Croix River



STATE OF MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION

Susan M. Lessard, Chair

Cynthia S. Berlocci Executive Analyst

Terry Dawson

PAUL R. LEPAGE GOVERNOR

July 18, 2012

Douglas H. Watts 131 Cony Street Augusta, Maine 04330

Matthew Manahan, Esq. Pierce Atwood Merrill's Wharf 254 Commercial Street Portland, Maine 04101 Charles Frechette Box 199 Sebago, Maine 04029

Joanna B. Tourangeau, Esq. Drummond Woodsum 84 Marginal Way, Suite 600 Portland, ME 04101-2480

RE:

Appeal in the Matter of: DEP Permit L-19937-33-J-N

S.D. Warren Company, Eel Weir Hydropower Project Water Quality Certification

Dear Parties:

By electronic mail on July 14, 2012, Mr. Watts submitted a decision issued by the U.S. Environmental Protection Agency (EPA), Region 1, dated July 9, 2012 concerning Maine law governing river herring passage on the St. Croix River. Mr. Watts requested that EPA's decision be entered into the record of his appeal of the State's water quality certification (WQC) for the Eel Weir Hydropower Project arguing that it is germane to the claims raised in his appeal.

I have reviewed Mr. Watts' request and EPA's decision. EPA's decision does not constitute evidence and, therefore, does not require a ruling from me on its admissibility as supplemental evidence under provisions of Chapter 2, section 24B(5) of the Department's rules. Rather, it is a decision by a federal agency charged with administering the Clean Water Act of which the Board may take official notice. Without making any determination regarding its legal relevance to the case currently before the Board, I will allow the document to be distributed to Board members and used in oral argument before the Board in the appeal proceeding on the Eel Weir WQC.

If any of the parties wishes to submit a brief written statement commenting on the relevance of EPA's July 9, 2012 decision to the current proceeding so that the Board may have the benefit of your views prior to the meeting, the statement must be submitted to the Board by Monday, August 6, 2012. Statements are limited to no more than 4 pages in length. Parties are cautioned that while I will allow comment on EPA's decision regarding the St. Croix River herring law, I expect that parties will focus their presentations at the Board meeting on the issues raised in the appeals.

BEP Letter to D. Watts, C. Frechette, J. Tourangeau, M. Manahan July 18, 2012 – Page 2

Please note that the Board's consideration of the appeals of the Eel Weir WQC tentatively scheduled for August 16, 2012 is being rescheduled for September 20, 2012.

If you have any questions, you may contact either Cynthia Bertocci, the Board's Executive Analyst, at 287-2452 or Jan McClintock, Assistant Attorney General, at 626-8566.

Sincerely,

Susan M. Lessard, Chair

Board of Environmental Protection

Chean M. Land

cc: Service List

Bertocci, Cynthia S

From: info@dougwatts.com

Sent: Saturday, July 14, 2012 1:08 PM info@dougwatts.com; Dawson, Terry

Cc: Bertocci, Cynthia S; Charles Frechette; Hinkel, Bill; Matthew Manahan; McClintock, Jan

Subject:RE: Watts Appeal: SD Warren L-19937-33-J-NAttachments:EPA letter to Maine re Herring 7-9-2012.pdf

Follow Up Flag: Follow up Flag Status: Flagged

Appellant Watts wishes to enter into the record of his appeal the attached letter issued by the US EPA on July 9, 2012. The letter is a ruling of law regarding the meaning and interpretation of Maine's water quality standards as they apply to native fish species under the U.S. Clean Water Act. Its findings and conclusions are directly germane to the factual and legal claims raised in my BEP appeal and to the Board's analysis of Clean Water Act compliance for native fish species at the Eel Weir Dam at Sebago Lake in the MDEP's Sect. 401 water quality certification for the dam issued August 30, 2011.

Thank you,

Douglas Watts

att: [EPA letter]



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY Region 1 5 Post Office Square, Suite 100

Boston, MA 02109-3912

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

July 9, 2012

William J. Schneider, Attorney General State of Maine 6 State House Station Augusta, Maine 04333

Dear Attorney General Schneider,

As you may know, EPA has recently been asked by two citizens' organizations in Maine to review the second paragraph of 12 M.R.S. § 6134 ("River herring passage; fishways on the St. Croix River") (effective April 9, 2008, and amended April 6, 2012), which directs the Commissioner of Marine Resources and the Commissioner of Inland Fisheries and Wildlife to ensure that the fishway on the Grand Falls Dam on the St. Croix River is configured or operated in a manner that prevents the passage of river herring, to determine whether this law effectively revised Maine's surface water quality standards. We are aware that this statute has been the subject of some debate within Maine already, and that many stakeholders have worked diligently and in good faith to address the various concerns raised. Our review focuses on Section 6134(2)'s status with respect to Maine's water quality standards developed and approved pursuant to Section 303 of the federal Clean Water Act.

12 MRS § 6134(2) Has the Effect of Revising Maine's Water Quality Standards

Section 6134(2) effectively revised Maine's surface water quality standards and is therefore subject to EPA review and approval pursuant to Section 303(c)(2) of the Clean Water Act and 40 C.F.R. Part 131. Section 6134(2) constitutes a new or revised water quality standard that EPA has the authority and duty to approve or disapprove under Section 303(c)(3) of the Clean Water Act because it is legally binding upon the state, and because, for the Class A and AA reaches of the St. Croix River main stem and tributaries upstream of the Grand Falls Dam, it addresses water quality criteria by specifically calling out river herring, which are indigenous aquatic life species previously protected by Maine's narrative water quality criteria for Class A and AA waters. In brief, Section 6134(2) expresses a desired condition that natural indigenous species shall not be present in the St. Croix River upstream of the Grand Falls Dam. As explained in more detail below, this effectively constitutes a revision of a narrative water quality criterion applicable to Class A and AA segments throughout the St. Croix River watershed.

¹ Maine defines "river herring" as alosa pseudoharengus, commonly known as alewife, and alosa aestivalis, commonly known as blueback herring. 12 M.R.S. § 6001(37-B). The two species are similar in size and function, although blueback herring spawn in Maine rivers a few weeks later than alewife.

Maine's water quality criteria for Class AA and A waters specify that "[t]he aquatic life ... shall be as naturally occurs." 38 M.R.S. §§ 465(1)(B), (2)(B) (emphasis added). "As naturally occurs" means "conditions with essentially the same physical, chemical and biological characteristics as found in situations with similar habitats free of measurable effects of human activity." Id. § 466(2). These criteria protect Maine's designated uses for Class AA and A waters, which include "habitat for fish and other aquatic life," with the habitat being characterized as "free-flowing and natural" for Class AA waters and "natural" for Class A waters. 38 M.R.S. §§ 465(1)(A), (2)(A), 465-A(1)(A).

EPA's Clean Water Act regulations require that water quality criteria protect designated uses. See 40 C.F.R. § 131.11(a)(1). Anadromous river herring are naturally occurring and indigenous and were known to thrive in the St. Croix River Basin upstream of the Grand Falls Dam prior to the fish passage closure.² By requiring closure of the fish passage to river herring at Grand Falls Dam, Maine has effectively revised the above-cited criteria so that they now provide that the aquatic life in Class AA and A waters upstream of the Grand Falls Dam shall be as naturally occurs, except that river herring (as well as any other migratory species unable to pass the obstruction) shall not be present, due entirely to state-mandated human activity.³ This alteration of the naturally occurring aquatic population has caused the habitat to be degraded by the artificial exclusion of fish species that would be present if the habitat were natural and which were present until 1995, when the Maine legislature first enacted the relevant fish-passage closure law.

12 MRS § 6134(2) Does Not Protect the Designated Use

Designated uses are "those uses specified in water quality standards for each water body or segment, whether or not they are being attained." As mentioned above, designated uses for Class AA and A waters include "habitat for fish and other aquatic life," with the habitat being characterized as "free-flowing and natural" for Class AA waters and "natural" for Classes A waters. 38 M.R.S. §§ 465(1)(A), (2)(A), 465-A(1)(A). "Natural" means "living in, or as if in, a state of nature not measurably affected by human activity." *Id.* § 466(9). Because river herring are indigenous to the St. Croix River, the "natural" (and, for Class AA waters, "free-flowing") fish habitat designated uses include habitat for river herring.

Existing uses are "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water standards." 40 CFR § 131.3(e). Because the St. Croix River waters upstream of the Grand Falls Dam were habitat for thriving indigenous populations of river herring before the initial enactment of the fish-passage closure law in 1995, the uses of those waters as river herring habitat are also existing ones. Indeed, according to the Maine Department of Marine Resources ("DMR"), "[a]lewives and blueback herring have co-evolved and co-existed with other native fish and wildlife in Maine's streams, rivers, ponds and lakes for thousands of years."

² Flagg, L.N., Historical and Current Distribution and Abundance of the Anadromous Alewife (Alosa pseudoharengus) in the St. Croix River. A Report to the State of Maine Atlantic Salmon Commission, 2007.

³ The fish passage closure also affects aquatic life downstream of the Grand Falls Dam. Because river herring are unable to migrate past the dam and spawn upstream, the numbers returning to even the portions of the St. Croix River accessible to river herring have declined dramatically. Thus, the entire river system (including not just Class A and AA segments upstream of the Grand Falls Dam, but also Class A segments downstream of the Grand Falls Dam) has an artificially altered aquatic population.

Because the fish-passage law established a desired condition for aquatic life in the St. Croix River that directs the artificial exclusion of river herring from its natural habitat, it no longer protects the designated uses for Class AA and A waters.

The Criteria Revision is Not Based on a Sound Scientific Rationale

EPA is not aware of any sound scientific rationale for excluding indigenous river herring (or other migratory species) from the St. Croix River that could support a criteria revision of this kind.

In fact, the Maine DMR has described the integral function of alewives, in particular, as a critical component in Maine ecosystems and fisheries as follows:

Alewives are important to the ecology of freshwater, estuarine, and marine environments. They provide an alternative prey item for osprey, eagles, great blue heron, loons and other fish eating birds at the same time juvenile Atlantic salmon are migrating downriver. Alewives provide cover for upstream migrating adult salmon that may be preyed on by eagles or osprey, and for young salmon in the estuaries and open ocean that might be captured by seals. It is important to understand that alewives tie our ocean, rivers and lakes together, providing vital nutrients and forage needed to make healthy watersheds. Between and within those various habitats, everything eats alewives: striped bass, bluefish, tuna, cod, haddock, halibut, American eel, brook trout, rainbow trout, brown trout, lake trout, landlocked salmon, smallmouth bass, largemouth bass, pickerel, pike, white and yellow perch, seabirds, bald eagle, osprey, great blue heron, gulls, terns, cormorants, seals, whales, otter, mink, fox, raccoon, skunk, weasel, fisher, and turtles.

Adult alewives are preferred bait for the spring lobster fishery. There are 35 Maine municipalities that have commercial harvesting rights to alewives on 39 streams and rivers. These runs provide revenue to the towns, many of which lease their fishing privileges to independent fishermen. Many of the fishways built for alewife restoration on some of our small coastal streams were partially funded by these municipalities because they recognized the value of this native fish species.⁵

EPA Actions

For the reasons stated above, EPA finds that 12 M.R.S. § 6134(2) constitutes a de facto revision of the narrative criteria at 38 M.R.S. §§ 465(1)(B) and (2)(B). Therefore, Section 6134(2) is subject to EPA review in accordance with Section 303(c) of the Clean Water Act and EPA's implementing regulations at 40 C.F.R Part 131.

This revision cannot be approved under the Clean Water Act and EPA regulations because the revision of the narrative criterion at 38 M.R.S. § 465(2)(B) is not accompanied by a sound scientific rationale and the revised criteria no longer support designated uses. See 40 C.F.R. § 131.11(a)(1).

Consequently, EPA hereby disapproves 12 M.R.S. § 6134(2). In the meantime, please note that 12 M.R.S. § 6134(2) is not effective for Clean Water Act purposes, as provided by 40 C.F.R. § 131.21(e).

^{5 &}quot;Maine River Herring Fact Sheet," supra note 4.

Effect of Disapproval

To address EPA's disapproval and protect designated and existing uses, Maine should take appropriate action to authorize passage of river herring to the portions of the St. Croix River above the Grand Falls Dam. However, no changes are needed to Maine's previously approved water quality standards. Because EPA is disapproving 12 M.R.S. § 6134(2), the existing standards at 38 M.R.S. §§ 465(1)(B) and (2)(B) remain in effect for Clean Water Act purposes.

Please feel free to contact Ronald Fein of our Office of Regional Counsel at 617-918-1040 or fein.ronald@epa.gov if you have any further questions.

Sincerely,

Stephen'S. Perkins, Director Office of Ecosystem Protection

Cc: Patrick C. Keliher, Commissioner, Maine Dept. of Marine Resources Chandler E. Woodcock, Commissioner, Maine Dept. of Inland Fisheries and Wildlife Patricia Aho, Commissioner, Maine Dept. of Environmental Protection David Courtemanch, Maine Dept. of Environmental Protection

12 §6134. RIVER HERRING PASSAGE; FISHWAYS ON THE ST. CROIX RIVER 12 §6134. RIVER HERRING PASSAGE; FISHWAYS ON THE ST. CROIX RIVER

This section governs the passage of river herring on the Woodland Dam and the Grand Falls Dam located on the St. Croix River. [2011, c. 598, §12 (AMD).]

1. Woodland Dam. By May 1, 2008, the commissioner and the Commissioner of Inland Fisheries and Wildlife shall ensure that the fishway on the Woodland Dam is configured or operated in a manner that allows the passage of river herring.

```
[ 2011, c. 598, §12 (AMD) .]
```

2. Grand Falls Dam. The commissioner and the Commissioner of Inland Fisheries and Wildlife shall ensure that the fishway on the Grand Falls Dam is configured or operated in a manner that prevents the passage of river herring.

```
[ 2011, c. 598, §12 (AMD) .]
```

```
SECTION HISTORY
```

1995, c. 48, §1 (NEW). 2007, c. 587, §1 (RPR). 2011, c. 598, §12 (AMD).

The State of Maine claims a copyright in its codified statutes. If you intend to republish this material, we require that you include the following disclaimer in your publication:

All copyrights and other rights to statutory text are reserved by the State of Maine. The text included in this publication reflects changes made through the Second Regular Session of the 125th Maine Legislature, is current through September 1, 2012, and is subject to change without notice. It is a version that has not been officially certified by the Secretary of State. Refer to the Maine Revised Statutes Annotated and supplements for certified text.

The Office of the Revisor of Statutes also requests that you send us one copy of any statutory publication you may produce. Our goal is not to restrict publishing activity, but to keep track of who is publishing what, to identify any needless duplication and to preserve the State's copyright rights.

PLEASE NOTE: The Revisor's Office cannot perform research for or provide legal advice or interpretation of Maine law to the public. If you need legal assistance, please contact a qualified attorney.

PIERCE ATWOOD 3

MATTHEW D. MANAHAN

Merrill's Wharf 254 Commercial Street Portland, ME 04101

PH 207.791.1189 FX 207.791.1350 mmanahan@pierceatwood.com pierceatwood.com Admitted in: ME NH

VIA EMAIL AND U.S. MAIL

August 6, 2012

Susan M. Lessard, Chair Maine Board of Environmental Protection c/o Terry Dawson 17 State House Station Augusta, ME 04333-0017

RE: S.D. Warren Co., Appeal of Water Quality Certification #L-19937-33-J-N

Dear Chair Lessard:

Pursuant to your July 18, 2012 letter, this letter responds to Mr. Watts's July 14, 2012 submission of EPA's July 9, 2012 letter concerning Maine law governing river herring passage on the St. Croix River.

In his July 14 email Mr. Watts argues that EPA's July 9 letter is "directly germane to the factual and legal claims raised in my BEP appeal and to the Board's analysis of Clean Water Act compliance for native fish species at the Eel Weir Dam at Sebago Lake in the MDEP's Sect. 401 water quality certification for the dam issued August 30, 2011." In fact, the EPA letter is not germane to Mr. Watts's appeal, for the reasons discussed below.

First, EPA's letter addresses whether a law that excludes certain indigenous fish from a Class AA or Class A waterbody is a *de facto* revision of an approved water quality standard. The letter has no bearing on a situation in which there has been no change to the State's approved water quality standards, as here.

Second, EPA's letter is limited to the facts presented in that situation. The EPA letter addresses whether 12 M.R.S. § 6134(2) effectively lowers a water quality criterion applicable to Class A and AA segments in the St. Croix River watershed. As discussed on page 29 of Warren's June 13, 2012 response to these appeals, Class A and Class GPA waters (which are the classifications of the waters at issue in these appeals) must be of such quality that they are suitable for the designated use of habitat for fish and other aquatic life. The habitat must be characterized as natural. 38 M.R.S. §§ 465(2)(A), 465-A(1)(A). "Natural" is defined as "living in, or as if in, a state of nature not measurably affected by human activity." 38 M.R.S. § 466(9). The Class A aquatic life standard provides that the aquatic life and bacteria content of Class A waters shall be "as naturally occurs." 38 M.R.S. § 465(2)(B). "As naturally occurs" means "conditions with essentially the same physical, chemical and biological characteristics as found in situations with similar habitats free of measurable effects of human activity." 38 M.R.S. § 466(2).

As discussed on page 29 of Warren's response to these appeals, Mr. Watts does not dispute that both the Presumpscot River and Sebago Lake support indigenous fish, including trout and salmon. What Mr.

PORTLAND, ME

BOSTON, MA

PORTSMOUTH, NH

PROVIDENCE, RI

AUGUSTA, ME

STOCKHOLM, SE

WASHINGTON, DC

Susan M. Lessard, Chair August 6, 2012 Page 2

Watts objects to is the fact that the trout and salmon in those waters are not "self-sustaining," but are supported primarily by annual stocking. But, as noted in Warren's response, there is nothing in the water quality standards that requires that fish populations must be self-sustaining - only that the water must support fish.

As discussed on page 34 of Warren's response to these appeals, Class A and Class GPA standards do not require that the habitat must be just like natural habitat, nor do they require that the habitat must be capable of supporting self-sustaining populations of fish. Rather, the habitat must be sufficiently comparable to natural habitat so that it supports fish with essentially the same physical, chemical, and biological characteristic as would be found in a similar natural habitat. This does not mean, and it does not say, that fish that are present must have the same ability to move freely between habitats as they would in the absence of the dam, only that each habitat must be able to support fish as would a similar natural habitat.

The situation addressed in the EPA letter is very different than the situation at issue in this appeal. EPA summarizes Section 6134(2) as follows: "In brief, Section 6134(2) expresses a desired condition that natural indigenous species shall not be present in the St. Croix River upstream of the Grand Falls Dam." EPA letter, p. 1 (emphasis added). Specifically, "by requiring closure of the fish passage to river herring at Grand Falls Dam, Maine has effectively revised the above-cited criteria so that they now provide that the aquatic life in Class AA and A waters upstream of the Grand Falls Dam shall be as naturally occurs, except that river herring (as well as any other migratory species unable to pass the obstruction) shall not be present, due entirely to state-mandated human activity." EPA letter, p. 2. Finally, "because the fish-passage law established a desired condition for aquatic life in the St. Croix River that directs the artificial exclusion of river herring from its natural habitat, it no longer protects the designated uses for Class AA and A waters." EPA letter, p. 3 (emphasis added).

This is a very different situation than that presented in these appeals because indigenous fish species <u>are present</u> in the subject waters, and the Certification does not direct that they be artificially excluded, as does Section 6134(2). Thus, the waters can and will continue to support fish (including indigenous fish species), as required by the Class A and Class GPA water quality standards. So EPA's letter, for that reason as well, is not germane to these appeals.

Thank you for considering this letter. I look forward to discussing these issues at the Board's September 20, 2012 meeting.

Sincerely

Matthew D. Manahan

Enclosure

cc: Service List Patricia Aho